United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

287A

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,605

WILLIAM BODDIE,
Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA.

Robert T. Smith
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Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether the Government proved all of the essential elements of the crime for which accused was tried.
2. Whether the prosecutor for the government and court-appointed counsel for the appellant violated a basic right of the accused to cross-examine a government witness by stipulating to the testimony of an absent witness without the consent of the accused.
3. Whether the prosecutor for the government improperly testified as to a subject about which no evidence was adduced at the trial and which severly prejudiced the appellant's case.

This case has not been heard this Court prior hereto.

G. W. Smith

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a criminal conviction, after jury trial, in the United States District Court for the District of Columbia. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U S. C. 1291.

STATEMENT OF THE CASE

The defendant was indicted and convicted on the charge that: "On or about December 6, 1966, within the District of Columbia, that William Boddie feloniously did take, use, operate and remove, one certain automobile, property of Wallace J. Izzo and Dorothy M. Izzo, from a certain lot, and did operate and drive said automobile for his own profit, use and purpose, without the consent of Wallace J. Izzo and Dorothy M. Izzo, the owners of said automobile." (Tr. 70)

On December 5th, 1966 Dorothy Izzo left her unlocked car with

the key in the ignition on a parking lot at 15th & Rhode Island Avenue in the District of Columbia. When she returned the same evening, the automobile was missing from the parking lot. Mrs. Izzo testified that she had not told anyone to take the car or authorized anyone to use it. (Tr. 24)

At the conclusion of the government's case court-appointed counsel for the appellant moved for a judgment of acquittal. The Court denied the motion. (Tr. 55)

The automobile involved was jointly owned by Mrs. Dorothy Marie Izzo and her husband, Wallace J. Izzo. No evidence was produced by the government as to whether or not the automobile was removed from the lot or used by the appellant without the consent of Mr. Wallace J. Izzo. Mr. Izzo was not called as a witness by the government and did not testify in the case.

The prosecuting attorney in his closing argument to the jury stated that the appellant had not related his testimony at trial to anyone prior thereto. (Tr. 62-63)

The jury returned a verdict of guilty. (Tr. 79)

STATEMENT OF POINTS

1. The government failed to produce, without explanation, a material witness, Wallace J. Izzo, named in the indictment against the appellant as an owner of the automobile which appellant was accused of using without his permission.
2. The prosecuting attorney for the government and court-appointed counsel for the appellant committed prejudicial error affecting substantial right of the accused by stipulating to the testimony of Roosevelt Wright, Jr., a material government witness who was absent from the Court, without the consent of the appellant.
3. The prosecuting attorney improperly gave testimony in his closing argument to the jury which was adverse to the appellant and contrary to any evidence adduced at the trial.

SUMMARY OF ARGUMENT

1. The government failed to prove by an available witness that the automobile in question was stolen or used by the appellant without the consent of one of the registered owners of the vehicle named in the indictment, Mr. Wallace J. Izzo.
2. The case against the appellant was fatally prejudiced by the testimony of the government prosecutor who stated in his closing argument that the appellant had not previously related how he came into possession of the automobile prior to trial.
3. The government prosecutor and court-appointed counsel for appellant abridged the appellant's rights to cross-examine a witness against him by stipulating to the testimony of a material government witness.

ARGUMENT

I. THE GOVERNMENT FAILED TO PROVE EACH ELEMENT OF THE CRIME FOR WHICH HE WAS INDICTED AND TRIED.

The indictment charged the appellant with operating and driving a certain automobile from a certain lot, "without the consent of Wallace J. Izzo (underscoring supplied) and Dorothy M. Izzo, the owners of said automobile". (Tr. 40).

Mrs. Izzo testified that she did not give anyone permission to drive the automobile from the parking lot where she had left it the morning of the alleged offense. (Tr. 24). When asked by the prosecutor if she knew whether her husband had given anyone else permission to use the car on the day in question she replied, "No, I don't". (Tr. 26) The government did not call Mr. Wallace J. Izzo to the witness stand. The record is, therefore, bare as to whether Mr. Wallace did or did not give anyone (including the defendant) permission to drive and use the automobile involved. No explanation or reason was given by the government for its failure to produce Mr. Izzo.

Thus, the appellant contends that the government failed completely to prove an essential element of the crime of unlawful use of an automobile; that is, that he had used the automobile without the consent of the owner, Mr. Wallace J. Izzo, as alleged in the indictment. (Tr. 76). The burden of proof rests with the government to establish evidence of each element of an offense. (U. S. v. Waters 73 F. Supp 72, appeal dismissed 69 S. Ct. 168, 325 U. S. 869, 93 L. Ed. 413, case CERTIFIED 84 U. S. App. D. C. 127, 175 F 2d 340.

Appellant contends that because of the absence of the testimony

of Mr. Wallace in this regard, it was error for the Court not to have directed a verdict of acquittal for the defendant in response to appellant's motion. (Tr. 55)

II. THE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL WAS ABRIDGED WHEN THE PROSECUTOR AND COUNSEL APPOINTED BY THE COURT TO DEFEND APPELLANT STIPULATED TO VITAL TESTIMONY OF THE PARKING LOT ATTENDANT, ROOSEVELT WRIGHT, JR.

The prosecutor and court-appointed counsel for the appellant stipulated at trial that the parking lot attendant, Roosevelt Wright, Jr., who was not produced in Court, would testify in substance if he were present that he did not give anyone permission to remove the automobile from the lot and that he did not see who removed it from the parking lot.

There is nothing in the record that would indicate that court-appointed counsel for the appellant had previous knowledge as to what the witness' testimony would be. Counsel stipulated to testimony proferred by the prosecutor without the consent of the appellant. (Tr. 41) The appellant was thereby deprived of his right to cross-examine a witness against him from whom he might have elicited material information in his defense.

III. THE GOVERNMENT PROSECUTOR IMPROPERLY TESTIFIED IN HIS CLOSING ARGUMENT TO THE JURY THAT THE APPELLANT HAD FAILED TO MAKE A STATEMENT TO THE POLICE FROM THE TIME OF HIS ARREST UNTIL HIS TESTIMONY AT TRIAL.

The prosecutor prejudiced the rights of the appellant to a fair trial when he stated in his argument to the jury that the appellant had not related the testimony which he gave at trial to anyone prior to the trial. (Tr. 62-63).

"You didn't hear any testimony or any cross-

> examination of Mr. Rosenberg (the police officer) any statement as to the defendant claiming immediately after his arrest that he didn't know it was stolen but that he got it from a fellow named Brooker? No.*** But nothing happened. Nobody was told that until we came in here today and were told.***

The foregoing statement made by the prosecutor in his closing argument is direct testimony by him about a subject which had not been touched upon in any testimony adduced at the trial. Officer Rosenberg did not state whether or not the appellant had made such a statement prior to trial. The prosecutor however, without any direct knowledge on his part told the jury that the appellant had not made such statements prior to trial.

In the case of Berger v. U. S. 295, U. S. 78, 88 (1935) the Supreme Court said:

> "The United States attorney is the representative not of an ordinary part of a controversary, but of a sovereignity whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

From the record of the case it is impossible to determine whether the appellant had related the testimony which he gave on the stand to anyone prior thereto. No inquiry was made of him by either side in this regard. By what right then did the prosecutor tell the jury

that the appellant had not previously related the same testimony? Appellant submits that the prosecutor's statement to the jury was plain error affecting the substantial rights of the accused. In this situation the Trial Judge should have stopped the prosecutor's argument without waiting for an objection. (Viereck v. U. S., 318 U. S. 236, 248 (1943); Stewart v. U. S., 101 U. S. App. D. C. 21. 247 F 2d 42 (1956).

CONCLUSION

For the reasons set forth hereinabove, this Court should direct entry of a judgment of acquittal on the charge of unauthorized use of a motor vehicle.

Respectfully Submitted,

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